

APPEAL NO. 040285
FILED MARCH 31, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 8, 2004. The hearing officer determined that respondent (claimant) did not sustain an injury in the course and scope of his employment; that after his injury claimant was diagnosed with a meniscus tear and meniscal cyst of the right knee; that appellant (carrier) waived the right to contest the compensability of the claimed bilateral knee injury; that claimant's injury is compensable; that carrier is not relieved of liability under Section 409.002; that claimant did give timely notice of injury; that claimant did not understand the difference between workers' compensation insurance and group health insurance and did not make an election of remedies; and that claimant is not barred from pursuing workers' compensation benefits due to an election of remedies. Carrier appealed the determinations regarding carrier waiver, compensability, liability under Section 409.002, and election of remedies, on sufficiency grounds. Carrier asserts that carrier waiver should not prevent it from asserting defenses regarding timely notice. Carrier contends that there can be no waiver because there was no injury pursuant to Continental Casualty Co. v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet.). Carrier also asserts the hearing officer erred in refusing to allow the testimony of Ms. F, carrier's adjuster. Claimant responded that the carrier waived its right to contest the claim and that carrier should be ordered to accept the claim.

DECISION

We affirm in part and reverse and render in part.

Carrier contends the hearing officer erred in determining that it waived the right to contest the compensability of the claimed injury. We agree. The hearing officer determined that carrier received written notice of the claimed injury on "February 10, 2002," and that carrier did not take any action within the seven-day period. It appears from the record that this date is in error and the hearing officer meant to find that carrier received notice on Monday, February 10, 2003. Texas Workers' Compensation Commission (Commission) Dispute Information Resolution System (DRIS) records admitted at the hearing show that the Commission received a Payment of Compensation or Notice of Refused/Dispute Claim (TWCC-21) from carrier on Tuesday, February 18, 2003. The seventh day after Monday, February 10, 2003, was Monday, February 17, 2003. That day was Presidents' Day, a national holiday listed in Section 662.003(a) of the Texas Government Code. Pursuant to Rules 102.3(a)(3) and (b), the seven-day time period for carrier to contest compensability was extended to February 18, 2003, which was the next day that was a working day as defined by Rule 102.3(b). See Texas Workers' Compensation Commission Appeal No. 030950, decided June 12, 2003. Because carrier's TWCC-21 contesting compensability was filed with the

Commission on February 18, 2003, the hearing officer erred in determining that the carrier waived its right to contest compensability in this case.

Because we are reversing the determination regarding carrier waiver and rendering a decision in carrier's favor, we need not address carrier's assertions regarding: (1) whether a finding of carrier waiver prevents a carrier from asserting defenses regarding timely notice; (2) whether there was carrier waiver pursuant to Williamson; and (3) whether the hearing officer erred in refusing to allow the testimony of Ms. F, carrier's adjuster. Carrier's assertions regarding the exclusion of evidence concerned whether it filed a TWCC-21 earlier than February 18, 2003, and whether there was carrier waiver in this case. Because we have already determined that carrier timely contested compensability and that there was no carrier waiver, any possible error in the exclusion of Ms. F's testimony was harmless under the facts of this case.

Carrier contends the hearing officer erred in determining that: (1) carrier is not relieved of liability under Section 409.002; (2) claimant did give timely notice of injury; and (3) claimant did not understand the difference between workers' compensation insurance and group health insurance and did not make an election of remedies; and (4) claimant is not barred from pursuing workers' compensation benefits due to an election of remedies. We have reviewed the complained-of determinations regarding whether there was a knowing election of remedies by claimant and whether claimant timely reported his claimed injury. We conclude that the issues involved fact questions for the hearing officer. The hearing officer reviewed the record and decided what facts were established. We conclude that the hearing officer's determinations are supported by the record and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). However, we note that because there was no carrier waiver in this case, there was no compensable injury.

We affirm that part of the hearing officer's decision and order that determined that claimant timely reported his claimed injury, that carrier is not relieved of liability under Section 409.002, and that there was no election of remedies. We reverse that part of the hearing officer's decision that determined that carrier waived the right to contest compensability and that the injury is compensable as a matter of law. We render a decision that carrier did not waive the right to contest the compensability. We render a decision that claimant's injury is not compensable.

According to information provided by carrier, the true corporate name of the insurance carrier is **OLD REPUBLIC INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**PRENTICE HALL CORPORATION SYSTEM, INC.
800 BRAZOS
AUSTIN, TEXAS 78701.**

Judy L. S. Barnes
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Robert W. Potts
Appeals Judge